SABABUMI (SANDAKAN) SDN BHD

v.

DATUK YAP PAK LEONG

FEDERAL COURT, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
PEH SWEE CHIN FCJ
ZAKARIA YATIM FCJ
[CIVIL APPEAL NO: 02-16-1996(S)]
20 MAY 1998

CONTRACT: *Terms - Implied terms - Implication of terms into a contract - Governing principles - Proper approach - The "business efficacy test" - The "officious bystander test" - Whether both tests must be satisfied before court can infer an implied term - Trial judge implying terms into contract - Whether based on proper legal basis*

CONTRACT: *Illegality - Void contract - Breach of terms of statute - Agreement made pursuant to gaming licence issued under Sabah Gaming Ordinance 1930 and Pool Betting Act 1967 - Agreement violated terms of licence - Whether agreement prohibited by s. 24(a) Contracts Act 1950 - Whether illegal and void - Sabah Gaming Ordinance 1930, s. 27(a) - Contracts Act 1950, ss. 24(a) & (b) - Evidence Act 1950, s. 92 - Pool Betting Act 1967, ss. 5, 21*

The Sandakan Turf Club ('the Club') was registered under the Societies Act 1966 for the purpose of carrying out gaming activities. Pursuant to its purpose, the Club obtained an exemption from the relevant authorities under the Sabah Gaming Ordinance 1930 ('the Ordinance'), and was allowed to carry on gaming activities in Sabah. The exemption apart, a licence was also granted to the Club to carry on public lotteries in the state ('original licence').

On 26 November 1987 the Club entered into an agreement with the appellant ('Sababumi') whereby it granted Sababumi exclusive rights to conduct off-course and on-course betting and gaming for twenty years, in consideration of payment to it of 2% of the gross takings thereof, and in further consideration of the promise by Sababumi to construct at its costs a race course and to manage and operate such gaming activities. The agreement ('the 1987 agreement') also included a few terms, one of which was cl 11 which dealt with consequences that would befall the parties in the event that either of the above-mentioned exemption or licence is cancelled. It was common ground that Sababumi thereafter expended large sums of money in keeping with their part of the bargain.

On 14 April 1992, the Sabah authorities cancelled the original licence, and in place thereof issued an amended licence to the Club. However, unlike the original licence, this amended licence carried with it a new condition, namely that "… this licence shall be personal to the licensee and shall not be transferable in any manner whatsoever". Shortly thereafter, the Pool Betting Act 1967 ('the Act') was enforced in Sabah, and following that the Finance Ministry informed the Club of their decision to cancel the amended licence. The Club was further informed that from thereon a licence under the Act is necessary for gaming activities. Consequently, the Club applied for and in 1995 was granted a licence under s. 5 of the Act ('the Federal licence'). Some new conditions were attached to the Federal licence, one of which was condition 23 which prohibited any transfer or assignment of the rights, duties and obligations appearing in the licence.

Misunderstandings subsequently arose between Sababumi and the Club as regards particularly the validity of the 1987 agreement. In the circumstances, claiming that the Federal licence was within the scope of the 1987 agreement, Sababumi took out an originating summons and applied to the High Court for declaratory and other reliefs.

The High Court, upon hearing the matter, and upon recourse to "the officious bystander" test, found that there ought to be implied into the 1987 agreement a term to the effect that the Federal licence fell within the scope of the agreement. It was thus the High Court's view that the 1987 agreement remained valid and enforceable even in the face of the terms of the Federal licence, on the ground that the terms of the licence could be implied into the agreement. In the circumstances, declarations were granted that the Federal licence and any renewals thereof is within the scope of the agreement, and that the Club was in breach of the said agreement.

The Court of Appeal disagreed with the High Court and concluded instead that the 1987 agreement could not further subsist or be enforceable. This apart, the Court of Appeal also took the view that the Club, by assigning to Sababumi the rights and benefits conferred by the original or Federal licence, had contravened s. 21(1) of the Act, and that being so, the agreement was prohibited by s. 24(b) of the Contracts Act 1950 and was for that reason illegal and void. Sababumi appealed, and before the learned judges of the Federal Court issues *inter alia* arose as to: (i) whether the Court of Appeal was correct in law and on the evidence in holding that the High Court was wrong in implying a term in the 1987 agreement in the manner it did; and (ii) whether the Court of Appeal was correct in law and on the evidence in holding that the 1987 agreement was tainted with illegality by reason of the breaches of the Gaming Ordinance of Sabah 1930 and the Pool Betting Act 1967.

Held:

Per Lamin Mohd Yunus PCA

[1] On whichever principles relating to implied terms as discussed by the Court of Appeal the order of the High Court in this respect cannot be upheld. The Court of Appeal was right in its finding that the implication of the relevant term by the learned High Court judge was wholly unjustified.

[1a] There were some material differences between the conditions of the original licence and the amended licence both issued by the State authority on the one hand, and those contained in the Federal licence on the other. Further, upon the issuance of the Federal licence under the Pool Betting Act 1967, that licence remains valid only for one year as stipulated by condition 1 thereof, whereas the two previous licences had no time limit. Again under the Federal licence, it is the Minister who approves the appointment of any agent, whereas under the 1987 agreement it was the company, ie, the appellant, that has exclusive rights to conduct and manage all bettings. Clearly, therefore, the Federal Minister's powers under the Federal licence are beyond the contemplation of the parties to the 1987 agreement.

[2] The illegality is more appropriately founded on s. 24(a) of the Contracts Act 1950 rather than on s. 24(b) as concluded by the Court of Appeal.

[2a] In any case, condition 23 prohibits the assignment or transfer of rights as provided in the licence. In the present case the breach has taken place in that the 1987 agreement has purportedly assigned wholly or partly of the rights of the said Turf Club granted by the Federal licence. The agreement is therefore illegal and void, having violated condition 23 of the Federal licence. As the licence was granted under s. 5 of the Pool Betting Act 1967, a breach of any of its conditions would be an offence and punishable under s. 21 of the said Act. In the result this has the effect of directly offending s. 24(a) of the Contracts Act 1950.

Per Peh Swee Chin FCJ

[1] Implied terms are of three types. The first are those which the court infers from evidence that the parties to a contract must have intended to include in the contract though not expressly set out therein. The second are those that come about by operation of law, whilst the third are ones that are implied by reasonable custom and usage of any market or trade. The implied term contended for in this appeal belongs to the first type.

[1a] As for the first type of implied term aforesaid, two tests must be satisfied before a court could infer them. The first is subjective in nature, and it is that such a term to be implied must be "something so obvious that it goes without saying, so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provisions for it in the agreement, they would testily suppress him with a common 'Oh, of course'." The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. Business efficacy means the desired result of the business in question.

[2] There is no doubt that by the 1987 agreement, both parties had decided to commit to each other in regard to such business on a long-term basis, apparently for 20 years. Thus at the time of negotiating for the said agreement or signing the same, if an officious bystander had asked the question whether such exclusive right to operate off-course and on-course betting for 20 years would continue if the licences and the said exemption were issued or granted by any other laws, ie, by law other than the said Gaming Ordinance of Sabah, both parties would have answered "Oh, of course". Further, the answer to the officious bystander would give business efficacy to the said business between the parties.

[3] It was wrong of the Court of Appeal to have taken the view that, since the parties herein had spelt out their rights and obligations very clearly and had made express provisions for contingencies that covered the present situation in this appeal, it would therefore militate against the inclusion of such implied term contended for.

[3a] The facts showed that the express provisions in question in the 1987 agreement provide for: (a) cancellation of the licence or the exemption, by the government or authority, through no fault of the Club or Sababumi; (b) cancellation of the same because of the fault of the Club; and (c) cancellation of the same because of the fault of Sababumi. Cancellation of the licence, in connection with the express provisions for the cancellation of licence in the agreement, can only mean the decision of the government or the licencing authority not to allow the off-course or on-course betting which has been going on hitherto, either through no fault of Sababumi, or the fault of the Club or through no fault of either the Club or Sababumi.

[3b] Clearly, the situation as described by the express provisions aforesaid has not occurred. What the Minister of Finance wanted was for the Club to carry on the on-course and off-course betting under the said Federal licence – a sort of old wine in new bolttle – and not to stop or disallow such betting. Therefore the express provisions could not be inconsistent with or inhibitory against the implied term contended for. Thus the express provisions for cancellation of licence also do not cover the situation arising from this appeal and are thus immaterial for the purpose of considering the question of the implied term. It follows that, on the point of implied term, the Court of Appeal has gone wrong and the decision of the High Court on the point ought to be upheld.

[4] Section 24(a) of the Contracts Act 1950 involves the consideration and/or object of a contract being forbidden by law. Under s. 24(a) an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act forbidden by law. This is to be distinguished from the question of whether a statute prohibits any contract. It is illegal and unenforceable under s. 24(a) because it is a contract involving consent of both contracting parties to do the very act prohibited or forbidden by statute.

[4a] To decide whether s. 24(a) makes a contract illegal and unenforceable in connection with a statute, one must find out first if the statute prohibits or forbids the act which the parties have contracted to do and **not** whether the statute prohibits the contract or the making of the contract in question. Though very subtle, this difference is real.

[5] In the instant case, the forbidden act is the breach of condition 23 of the Federal licence issued under the Act. That breach is also a punishable offence under s. 21 thereof. The breach of condition 23 has occurred because the 1987 agreement had purportedly assigned wholly or partly the rights of the Club as granted to it by the Federal licence. On the facts, it would be quite impossible to say that the obtaining of exclusive rights by Sababumi to operate the off-course and on-course betting is not an assignment wholly or partly of such rights granted to the Club by the Federal licence. The 1987 agreement is thus a contract to do an act forbidden or prohibited by s. 21 of the Act.

[6] In the circumstances, this appeal ought to be dismissed and the order of the Court of Appeal ought to be upheld, though for somewhat different reasons.

Per Zakaria Yatim FCJ

[1] As shown by the cases of *Moorcock*, *Reigate v. Union Manufacturing Company Ltd* and *Shirlaw v. Southern Foundries Ltd*, two elements need to be satisfied in determining whether a term ought to be applied in a contract. They are the business efficacy of the transaction and the officious bystander test.

[2] The agreement was a co-operation agreement between two commercial bodies for a period of twenty years. When the parties were negotiating the agreement they must have intended to give the joint venture agreement business efficacy for a period of twenty years. Also, when the agreement was being negotiated, the officious bystander would ask the following question, namely, "Betting and lotteries are Federal matters under item 4 of the Nineth Schedule of the Federal Constitution. What will happen if the Sabah Gaming Ordinance is repealed by a Federal Order and the Pool Betting Act extended to Sabah?", and the answer by the parties would be, "Of course we know that … we have made some provisions in cl. 11 with regard to the cancellation of the licence in different situations and there is no need to make any express provision in the agreement".

[3] Both elements have thus been satisfied and the Court of Appeal has therefore erred on the issue of implied terms. The decision of the High Court in implying a term in the agreement should be upheld.

[4] With regard to the issue of illegality, the 1987 agreement clearly violates condition 23 of the Federal licence. Condition 23 prohibits the assignment or the transfer of rights, whereas under the 1987 agreement the Club had assigned to Sababumi all rights to manage all bettings on the races at the race course and to operate all 3-D and 4-D lotteries. A breach of condition 23 is an offence punishable under s. 21 of the Pool Betting Act 1967. This is contrary to s. 24(a) of the Contracts Act 1950 and the agreement is therefore illegal and void.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Sandakan Turf Club ('Kelab tersebut') dalam kes ini telah didaftarkan di bawah Akta Pertubuhan 1966 bagi tujuan menjalankan aktiviti-aktviti perjudian. Selaras dengan tujuannya, Kelab tersebut telah mendapatkan suatu pengecualian daripada pihak-pihak berkuasa yang relevan di bawah Ordinan Perjudian Sabah 1930, Bab. 50 ('Ordinan tersebut'), dan telah dibenarkan untuk menjalankan aktiviti-aktiviti perjudian di Sabah. Selain daripada pengecualian tersebut, satu lesen telah juga diberikan kepada Kelab tersebut untuk menjalankan loteri-loteri awam di negeri tersebut ('lesen asas') .

Pada 26 November 1987 Kelab tersebut telah memasuki satu perjanjian dengan perayu ('Sababumi') di mana ianya telah memberikan kepada Sababumi hak eksklusif untuk mengendalikan perjudian dan pertaruhan luar-balapan dan di balapan selama 20 tahun, dengan balasan pembayaran kepadanya sebanyak 2% daripada kutipan kasar darinya, dan sebagai balasan selanjutnya akan janji oleh Sababumi untuk membina atas kosnya yang tersendiri dan mengendalikan serta menjalankan aktivit-aktiviti perjudian yang sedemikian. Perjanjian tersebut ('perjanjian 1987 tersebut') juga mempunyai beberapa terma, salah satu daripadanya adalah Fasal 11, yang berkaitan dengan akibat yang akan menimpa pihak-pihak tersebut sekiranya mana-mana satu daripada pengecualian atau lesen yang tersebut di atas dibatalkan. Selepas itu sebagai alasan yang biasa, Sababumi telah membelanjakan sebilangan wang yang banyak bagi memenuhi persetujuan mereka.

Pada 14 April 1992, Pihak Berkuasa Sabah telah membatalkan lesen asal, dan bagi menggantikannya telah mengeluarkan satu lesen terpinda kepada Kelab tersebut. Walaubagaimanapun, tidak seperti lesel asal, lesen terpinda ini mempunyai satu syarat baru, iaitu bahawa "... this license shall be personal to the licensee and shall not be transferable in any manner whatsoever"; "... lesen ini adalah dkeluarkan atas sifat peribadi kepada pemegang lesen dan tidak boleh dipindahkan dalam apa cara sekalipun." Sejurus kemudiannya, Akta Pertaruhan Pool, 1967 ('Akta tersebut') telah dikuatkuasakan di Sabah, dan berikutan itu Kementerian Kewangan telah memaklumkan Kelab tersebut mengenai keputusan mereka untuk membatalkan lesen yang terpinda itu. Kelab tersebut telah dimaklumkan bahawa bermula daripada ketika itu satu lesen di bawah Akta tersebut adalah perlu untuk aktiviti-aktiviti perjudian. Akibatnya, Kelab tersebut telah memohon dan dalam tahun 1995 telah diberikan satu lesen di bawah s. 5 Akta tersebut ('Lesen Persekutuan tersebut') sepertimana biasa, sebilangan syarat-syarat baru terdapat pada lesen Persekutuan tersebut, salah satu daripadanya adalah syarat 23 yang mana melarang sebarang pemindahan atau penyerahhakan segala hak-hak, kewajipan dan obligasi yang terdapat dalam lesen tersebut.

Kemudiannya berbangkit salah faham antara Sababumi dan kelab tersebut berhubung secara khususnya dengan keesahan perjanjian 1987. Dalam keadaan yang sedemikian, menuntut bahawa lesen Persekutuan tersebut adalah dalam lingkungan perjanjian 1987 itu, Sababumi telah mengeluarkan satu saman pemula serta memohon kepada Mahkamah Tinggi, Kota Kinabalu untuk pengisytiharan dan lain-lain relief.

Mahkamah Tinggi, setelah mendengar perkara tersebut dan setelah berpaling kepada ujian "officious bystander", mendapati bahawa seharusnya tersirat di dalam perjanjan 1987 tersebut satu terma yang memberi kesan bahawa lesen Persekutuan itu jatuh di dalam lingkungan perjanjian tersebut. Ianya dengan itu merupakan pendapat Mahkamah Tinggi bahawa perjanjian 1987 tersebut tetap kekal dan boleh dikuatkuasakan walaupun menurut kehendak-kehendak terma lesen Persekutuan atas alasan bahawa terma-terma lesen tersebut boleh tersirat di dalam perjanjian tersebut. Dalam keadaan yang sedemikian, pengisytiharan telah diberikan bahawa lesen Persekutuan dan mana-mana pembaharuannya adalah dalam lingkungan perjanjian tersebut, dan bahawa Kelab tersebut telah memungkiri perjanjian itu.

Ketika rayuan, Mahkamah Rayuan telah tidak bersetuju dengan keputusan Mahkamah Tinggi dan sebaliknya telah membuat keputusan bahawa perjanjian 1987 tersebut tidak boleh berkekalan seterusnya atau dikuatkuasakan. Selain daripada ini, Mahkamah tersebut juga berpendapat bahawa dengan menyerahhak kepada Sababumi segala hak dan kemanfaatan yang diberikan oleh lesen asal atau lesen Persekutuan, Kelab tersebut telah melanggari s. 21(1) Akta tersebut, dan oleh kerana keadaannya sedemikian, perjanjian tersebut telah dilarang oleh s. 24(b) Akta Kontrak 1950 dan adalah atas alasan itu tidak sah di sisi undang-undang dan batal. Sababumi telah membuat rayuan, dan di hadapan hakim-hakim Mahkamah Persekutuan yang bijaksana, isu-isu antara lainnya berbangkit berhubung dengan: samada Mahkamah Rayuan betul di sisi undang-undang dan menurut keterangan dalam memutuskan bahawa Mahkamah Tinggi adalah salah dalam membayangkan satu terma dalam perjanjian 1987 menurut cara yang telah ianya lakukan; samada Mahkamah Rayuan betul di sisi undang-undang dan menurut keterangan dalam memutuskan bahawa perjanjian 1987 tersebut telah tercemar dengan kepenyalahan undang-undang disebabkan oleh kemugkiran-kemungkiran Ordinan Perjudian Sabah 1930 dan Akta Pertaruhan Pool 1967.

Diputuskan:
Oleh Lamin Mohd Yunus PMR

[1] Berdasarkan mana-mana prinsip berhubung dengan terma-terma tersirat sepertimana yng dibincangkan oleh Mahkamah Rayuan, perintah Mahkamah Tinggi sehubungan dengan perkara ini tidak boleh di sahkan. Mahkamah Rayuan betul dalam keputusannya bahawa implikasi terma yang relevan oleh Hakim Mahkamah Tinggi adalah sesungguhnya tidak wajar.

[1a] Terdapat perbezaan yang penting antara syarat-syarat lesen asal dan lesen terpinda yang kedua-duanya dikeluarkan oleh Pihak Berkuasa Negeri di satu pihak, dan yang terkandung di dalam lesen Persekutuan di pihak yang lain. Selanjutnya, setelah pengeluaran lesen Persekutuan di bawah Akta Pertaruhan Pool 1967, lesen itu kekal sah hanya selama satu tahun sahaja sepertimana yang di tetapkan oleh syarat 1 di dalamnya, sedangkan kedua-dua lesen yang terdahulu tidak mempunyai had masa. Sekali lagi, di bawah lesen Persekutuan, ianya merupakan Menteri yang meluluskan perlantikan mana-mana ejen, sedangkan di bawah perjanjian 1987 ianya merupakan Syarikat tersebut, iaitu perayu, yang mempunyai hak eksklusif untuk mengendalikan dan menguruskan kesemua pertaruhan. Dengan itu, jelasnya, kuasa-kuasa Menteri Persekutuan di bawah lesen Persekutuan adalah di luar jangkaan pihak-pihak kepada perjanjian 1987 tersebut.

[2] Kepenyalahan undang-undang adalah lebih wajarnya diasaskan pada s. 24(a) Akta Kontrak dan bukannya pada s. 24(b) sepertimana yang diputuskan oleh Mahkamah Rayuan.

[2a] Dalam sebarang kes, syarat 23 melarang penyerahhakan atau pemindahan hak dan lain-lain sepertimana yang diperuntukan dalam lesen tersebut. Dalam kes semasa kemungkiran tersebut telah berlaku iaitu perjajjian 1987 telah dikatakan menyerahhak keseluruhan atau sebahagian dari hak Kelab Lumba Kuda tersebut yang diberikan oleh lesen Persekutuan. Perjanjian tersebut adalah dengan itu tidak sah dan batal, kerana telah melanggari syarat 23 lesen Persekutuan tersebut. Oleh kerana lesen tersebut telah dberikan di bawah s. 5 Akta Pertaruhan Pool 1967, kemungkiran akan mana-mana dari syaratnya adalah satu kesilapan dan boleh dihukum di bawah s. 21 Akta tersebut. Akibatnya perkara ini mempunyai kesan menyalahi secara langsung s. 24(a) Akta Kontrak 1950.

Oleh Peh Swee Chin HMP

[1] Terdapat tiga jenis terma-terma tersirat. Terma tersirat yang pertama adalah jenis yang mana mahkamah membuat kesimpulan daripada keterangan bahawa pihak-pihak kepada sesuatu kontrak semestinya telah berniat untuk memasukkan dalam kontrak tersebut walaupun tidak secara nyatakan dibentangkan di dalamnya. Jenis yang kedua adalah yang wujud melalui operasi undang-undang, sedangkan yang ketiga adalah yang tersirat oleh adat dan kelaziman yang wajar oleh mana-mana pasaran atau perdagangan. Terma tersirat yang disetujui dalam rayuan ini adalah jenis yang pertama.

[1a] Berhubung dengan terma tersirat jenis pertama yang tersebut di atas, dua ujian haruslah dilaksanakan sebelum sesebuah mahkamah boleh membuat kesimpulan mengenainya. Yang pertama bersifat subjektif dan sesuatu terma yang tersirat semestinya "sesuatu yang amat ketara hinggakan ianya telahpun diandaikan, supaya, sekiranya, ketika pihak-pihak tersebut mematuhi janji mereka, seseorang "officious bystander" menyarankan peruntukan-peruntukan nyata baginya dalam perjanjian tersebut, mereka akan secara melenting menyekatnya dengan ungkapan biasa "oh, sudah tentu". Ujian yang kedua adalah bahawa terma tersirat itu seharusnya jenis yang akan memberikan keberkesanan perniagaan kepada transaksi kontrak kedua-dua pihak tersebut. Keberkesanan perniagaan bermakna keputusan yang diinginkan daripada perniagan yang diperkatakan.

[2] Tiada keraguan bahawa melalui perjanjian 1987 tersebut kedua-dua pihak telah membuat keputusan untuk bertanggungjawab kepada satu dan yang lain berhubung dengan perniagaan yang sedemikian atas dasar jangka panjang, nampaknya selama 20 tahun. Dengan itu ketika perundingan untuk perjanjian tersebut atau menandatanganinya, jika seorang "officious bystander" telah bertanya soalan samada hak eksklusif untuk mengendalikan pertaruhan luar balapan dan di balapan selama 20 tahun akan berterusan sekiranya lesen-lesen dan pengecualian tersebut dikeluarkan atau diberikan oleh mana-mana undang-undang yang lain, iaitu menurut undang-undang selain daripada Ordinan Perjudian Sabah, kedua-dua pihak pasti telah menjawab, "Oh, tentu sekali". Selanjutnya, jawapan kepada "officious bystander" tersebut akan memberikan keberkesanan perniagaan kepada perniagaan antara pihak-pihak tersebut.

[3] Mahkamah Rayuan bertindak secara salah kerana berpendapat bahawa, oleh kerana pihak-pihak di sini telah menyebut mengena hak mereka dan kewajipan mereka dengan nyatanya dan telah membuat peruntukan-peruntukan nyata untuk kontinjensi yang melindungi situasi semasa dalam rayuan ini, ianya akan dengan itu menghalang kemasukan akan terma tersirat yang ditegaskan.

[3a] Fakta-fakta menunjukkan bahawa peruntukan-peruntukan nyata yang dipersoalkan dalam perjanjian 1987 memperuntukan (a) pembatalan lesen tersebut atau pengecualian, oleh Kerajaan atau pihak berkuasa, yang bukan disebabkan oleh kesilapan Kelab atau Sababumi (b) pembatalan perkara yang sama disebabkan oleh kesilapan Kelab tersebut (c) pembatalan perkara yang sama disebabkan oleh kesilapan Sababumi. Pembatalan lesen tersebut, sehubungan dengan peruntukan-peruntukan nyata bagi pembatalan lesen dalam perjanjian tersebut, hanya boleh bermakna bahawa keputusan Kerajaan atau pihak berkuasa perlesenan supaya tidak membenarkan pertaruhan di luar balapan dan di balapan yang mana telah berterusan, samada bukannya melalui kesilapan Sababumi atau kesilapan Kelab tersebut atau pun tidak melalui kesilapan Kelab tersebut atau Sababumi.

[3b] Jelasnya, situasi tersebut sepertimana yang diterangkan oleh peruntukan-peruntukan nyata yang tersebut di atas telah tidak berlaku. Apa yang dikehendaki oleh Menteri Kewangan adalah untuk Kelab tersebut meneruskan pertaruhan di balapan atau di luar balapan di bawah lesen Persekutuan tersebut – dan bukannya memberhentikan atau tidak membenarkan pertaruhan yang sedemikian. Dengan itu peruntukan-peruntukan nyata tidak mungkin tak konsisten dengan atau bersifat menghalang terhadap terma tersirat yang ditegaskan. Oleh itu peruntukan-peruntukan nyata untuk pembatalan lesen juga tidak melindungi situasi yang berbangkit daripada rayuan ini dan adalah dengan itu tidak penting bagi tujuan mempertimbangkan persoalan terma tersirat. Adalah didapati bahawa, menurut perkara terma tersirat, Mahkamah Rayuan telah tersalah dan keputusan Mahkamah Tinggi mengenai perkara itu seharusnya dipertahankan atau disahkan.

[4] Seksyen 24(a) Akta Kontrak 1950 melibatkan pertimbangan dan/atau tujuan sesuatu kontrak dilarang oleh undang-undang. Di bawah s. 24(a) sesuatu perjanjian adalah dianggap tidak sah di sisi undang-undang dan tidak boleh dikuatkuasakan apabila samada pertimbangan atau tujuan perjanjian tersebut adalah untuk melakukan satu perbuatan yang dilarang oleh undang-undang. Ini haruslah diperbezakan darpada persoalan samada sesuatu statut melarang mana-mana kontrak. Ianya adalah tidak sah di

sisi undang-undang dan tidak boleh dikuatkuasakan di bawah s. 24(a) kerana ianya merupakan satu kontrak yang melibat persetujuan kedua-dua pihak yang berkontrak untuk melakukan perbuatan yang dilarang atau ditegah oleh statut.

[4a] Bagi membuat keputusan samada s. 24(a) menjadi sesuatu kontrak itu tidak sah di sisi undang-undang dan tidak boleh dikuatkuasakan berhubung dengan sesuatu statut, seseorang pertamnya mestilah memastikan jika statut itu melarang atau mencegah perbuatan yang telah pihak-pihak tersebut memasuki kontrak untuk melakukan dan **bukannya** samada statut itu melarang kontrak tersebut atau pembuatan kontrak yang dipersoalkan itu. Walaupun tidak ketara, perbezaan ini adalah kenyataan.

[5] Dalam kes semasa, perbuatan yang dilarang itu adalah kemungkiran syarat 23 lesen Persekutuan di bawah s. 21 Kemungkiran syarat 23 telah berlaku kerana perjanjan 1987 telah dikatan menyerahhak keseluruhan atau sebahagian daripada hak Kelab tersebut sepertimana yang telah diberikan kepadanya oleh lesen Persekutuan tersebut. Berdasarkan fakta tersebut, ianya agak mustahil untuk menyatakan bahawa perolehan hak eksklusif oleh Sababumi untuk mengendalikan pertaruhan di luar balapan dan di balapan bukannya merupakan penyerahhakan keseluruhan atau sebahagian hak-hak yang sedemkian yang telah diberikan kepada Kelab tersebut oleh lesen Persekutuan itu. Perjanjian 1987 itu adalah dengan itu merupakan satu kontrak untuk melakukan satu perbuatan yang dilarang atau ditegah oleh s. 21 Akta tersebut.

[6] Dalam keadaan yang sedemikian, rayuan ini seharusnya ditolak dan Perintah Mahkamah Rayuan seharusnya dipertahankan, walaupun untuk alasan yang agak berlainan.

Oleh Zakaria Yatim HMP

[1] Sepertimana yang ditunjukkan oleh kes-kes *Moorcock, Reigate v. Union Manufacturing Company Ltd dan Shirlaw v. Southern Foundries Ltd,* dua unsur haruslah dipenuhi dalam menentukan samada suatu terma seharusnya dipakai dalam sesuatu kontrak. Ianya adalah keberkesanan perniagaan transaksi tersebut dan ujian "officious bystander"

[2] Perjanjian tersebut adalah merupakan perjanjian kerjasama antara dua perbadanan komersyial bagi tempoh selama dua puluh tahun. Oleh keadaan yang sedemikian, ketika pihak-pihak tersebut sedang merundingkan perjanjan tersebut mereka pastinya telah berniat untuk memberikan perjanjian usahasama tersebut keberkesanan perniagaan bagi tempoh selama dua puluh tahun. Juga, ketika perjanjian tersebut

dirundingkan, "officious bystander" akan menanyakan persoalan yang berikut, iaitu "Betting and lotteries are Federal matters under item 4 of the Nineth Schedule of the Federal Constitution. What will happen if the Sabah Gaming Ordinance is repealed by a Federal Order and the Pool Betting Act extenbded to Sabah?" dan jawapan oleh pihak-pihak tersebut adalah, "Of course we know that ... we have made some provisions in cl. 11 with regard to the cancellation of the licence in differect situation and there is no need to make any express provision in the agreement".

[3] Kedua-dua unsur dengan itu telah dipenuhi dan Mahkamah Rayuan dengan itu telah tersalah atas isu terma-terma tersirat. Keputusan Mahkamah Tinggi dalam menyebut sesuatu terma dalam perjanjian tersebut seharusnya dipertahankan.

[4] Berhubung isu kepenyalahan undang-undang, perjanjian 1987 jelas melanggari syarat 23 Lesen Persekutuan tersebut. Syarat 23 melarang penyerahhakan atau pemindahan hak, sedangkan di bawah perjanjan 1987 Kelab tersebut telah menyerahhak kepada Sababumi kesemua hak untuk mengendalikan kesemua pertaruhan atas perlumbaan di balapan lumba kuda tersebut dan untuk mengendalikan kesemua loteri 3-D dan 4-D. Kemungkiran syarat 23 adalah satu kesalahan yang boleh dihukum di bawah s. 21 Akta Pertaruhan Pool. Ini adalah bertentangan dengan s. 24(a) Akta Kontrak 1950 dan perjanjian tersebut adalah dengan itu tidak sah dan batal.

[Rayuan ditolak.]

Cases referred to:

BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council [1977] 16 ALR 363 ***(foll)***
Kammins Ballrooms Co Ltd v. Zenith Instruments (Torquay) Ltd [1970] 2 All ER 871 ***(cit)***
Liverpool City Council v. Irwin & Anor [1977] AC 239 ***(foll)***
Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd [1971] 2 MLJ 161 ***(refd)***
Luxor (Eatborne) v. Cooper [1941] AC 108 ***(foll)***
Moorcock [1889] 14 P64 ***(refd)***
Reigate v. Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592 ***(foll)***
Shirlaw v. Southern Foundries (1928) Ltd [1939] 2 KB 206 ***(foll)***
St John Shipping Corp v. Joseph Rank Ltd [1957] 1 QB 267 ***(cit)***
Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co v. Sdn Bhd [1977] 2 MLJ 200 ***(refd)***
Vital Food Products Inc v. Unus Shipping Co [1939] AC 277 ***(refd)***
Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd [1993] 3 CLJ 188 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 24(a), (b)
Evidence Act 1950, s. 92(e)
Gaming Ordinance 1930 [Sabah], s. 27(a)
Pool Betting Act 1967, ss. 5, 21
Rules of the Federal Court 1995, r. 108(1)(c)

For the appellant - Tommy Thomas (CL Wong & R Fernandez with him); M/s Shelley Yap Leong Tseu & Chong Chia & Co
For the respondent - Cecil Abraham (Colin Lau & Dhinesh Bhaskaran with him); M/s Colin Lau & Co

[Appeal from Court of Appeal, Kuala Lumpur; Civil Appeal No: S-02-275 of 1995; [1997] 1 CLJ 23]

Reported by WA Sharif

JUDGMENT

Lamin Mohd Yunus PCA:

I have had the privilege of reading the draft judgment of my brother judge Peh Swee Chin, FCJ and with respect I entirely agree with him as to the result in that we uphold the order of the Court of Appeal and that the appeal is therefore dismissed. The High Court below at Kota Kinabalu decided in favour of the appellants who brought this action as plaintiffs before the said court by way of an originating summons.

The facts of the case have been gone into in some length by the Court of Appeal in its judgment and to some extent by my brother judge Peh Swee Chin, FCJ and so I do not propose to repeat them unless when I find it necessary to do so. The High Court declared that the Federal licence of January 1995 was within the scope of the 1987 Agreement. In other words the 1987 Agreement remained valid and enforceable even in the face of the terms of the said Federal licence on the ground that the terms of the licence could be implied into the agreement. However the Court of Appeal did not agree with the finding of the High Court and after dealing extensively with the legal principles relating to implied terms it came to the conclusion that the 1987 Agreement could not further subsist and be enforceable. The Court of Appeal also struck down the said agreement on the ground of illegality, an issue not canvassed before the High Court but taken for the first time before it.

On the issue of implied term, with respect, my brother judge Peh Swee Chin, FCJ found himself at variance with the Court of Appeal. He said that with the issuance of the Federal licence of 1995 the Club was to carry on with

the on-course and off-course betting "a sort of old wine in new bottle" and so the decision of the High Court should be upheld. For my part on whichever principles relating to implied terms as discussed by the Court of Appeal the order of the High Court cannot be upheld. I therefore agree with the finding of the Court of Appeal on this issue. If I may mention very briefly only on certain aspects of the arguments regarding the said issue. There were some material differences between the conditions of the original licence and the amended licence both issued by the State Authority on the one hand and on the other those contained in the Federal licence of 1995. As observed by the Court of Appeal some of them were absent in both the original and the amended licenses. For example conditions 9, 25 and 26 of the Federal licence are not found in both the original and the amended licence. Conditions 9, 25 and 26 read:

> 9. The licensee shall produce a list and details of agents that are appointed by him for the Minister's approval. The agents whose appointment has not or was not approved by the Minister cannot operate.
>
> 25. The Minister can at any time add, vary or cancel any condition or restriction that is stated in this license.
>
> 26. The Minister can at any time cancel this license without giving any reason.

Further upon the issuance of the 1995 Federal licence under the Pool Betting Act 1967, it remains valid only for one year as condition No. 1 so stipulates. The previous two licences had no time limit. Again under the Federal licence, it is the Minister who approves the appointment of any agent. Under the 1987 Agreement the company (the appellants) has the exclusive rights to conduct and manage all bettings. Clearly therefore the Federal Minister's powers under the Federal licence are beyond the contemplation of parties to the 1987 Agreement. In this regard, I need only quote the words of the Court of Appeal appearing at p. 196 of the appeal record:

> We are entirely satisfied; adopting the objective test suggested by Lord Radcliffe in *Davis Contractors,* that the farthest thing operating upon the minds of the present litigants, when they made their bargain, having regard to all the facts and circumstances in existence at the time when they made it, was the repeal of the Ordinance and its replacement by the Act. Nor can they be said to have had within their contemplation, the cancellation of the original or the Amended licence issued under the Ordinance and the issuance of the 1995 licence containing all those far reaching conditions to which we have already referred. These are the only conclusions that may be drawn when the agreement is construed as a whole. It matters not whether one applies the officious bystander test or that propounded by Lord Simon of Glaisdale in *BP Refinery (supra).* The result is the same. The implication of the term by the judge was wholly unjustified.

On the issue of illegality, the Court of Appeal found that the circumstances of this case had attracted s. 24 of the Contracts Act 1950. We agree.

The illegality, as far as the Court of Appeal is concerned is founded under s. 24(b). We think, however s. 24(a) is more appropriate. At p. 214 of the appeal record it says:

> So too, in the present case, the agreement, if countenanced, would defeat the Act. The agreement therefore falls squarely within section 24(b) of the Contracts Act 1950, and is, by reason thereof, illegal and void.

My brother judge Peh Swee Chin, FCJ says this:

> It is illegal and unenforceable under section 24(a) aforesaid because it is a contract involving consent of both contracting parties to do the very act prohibited or forbidden by statute.

To him the prohibited or the forbidden act is "the breach of condition 23 of the aforesaid Federal licence issued under the said statute for the following reasons." If we may recall condition 23 prohibits the assignment or the transfer of rights etc, as provided in the licence. In the present case the breach has taken place in that the agreement has purportedly assigned wholly or partly of the rights of the said turf club granted by the Federal licence. By virtue of cl. 3(b) of the agreement the company (the appellants) is granted "exclusive rights to conduct and manage" both the on-course and off-course bettings. The appointment of agents to operate those bettings shall only be made by the company (cl. 17 of the Agreement). My brother judge Peh Swee Chin, FCJ said that it "would be impossible to say that the obtaining of such exclusive right to operate the off-course and on-course betting is not an assignment wholly or partly of such rights granted to the said turf club by the said Federal licence." The agreement is therefore illegal and void as it violates condition 23 of the Federal licence. As the licence was granted under s. 5 of the Pool Betting Act 1967, a breach of any of its conditions would be an offence and punishable under s. 21 of the said Act. In the result I am also of the view that this has the effect of directly offending s. 24(a) of the Contracts Act 1950.

As I have indicated earlier that this appeal is to be dismissed and it is so dismissed with costs here and in the Court of Appeal. Normally in a similar situation the respondents should get their costs before the High Court as well. But in view of the fact that the issue of illegality was brought up by the respondents for the first time before the Court of Appeal and not at first instance and carried on before us, each party shall pay their own costs in respect of proceedings before the High Court. The deposit for the purpose of this appeal shall be paid out to account of taxed costs.

Peh Swee Chin FCJ:

This appeal raises two interesting but complicated questions of law, one relating to the implied terms of a contract and the other, illegality of contract.

The matter originated in the High Court at Kota Kinabalu, where the appellant before us filed an originating summons, claiming as follows:

(a) a declaration that the licence dated January 1995 issued by the relevant authority to the Defendant under the pool Betting Act 1967, and any renewals thereof, is within the scope of the Agreement between the Plaintiff and the Defendant dated 26th November 1987 (*the 1988 Agreement*);

(b) a declaration that the Plaintiff has the exclusive right to conduct and manage all 3-Digit (3-D) and 4-Digit (4-D) operations in and throughout the State of Sabah pursuant to and in accordance with the said licence dated January 1995 issued to the Defendant under the Pool Betting Act 1967, and any renewals thereto;

(c) a declaration that the Plaintiff has the exclusive right to appoint all 3-D and 4-D operations agents in the State of Sabah on behalf of the Defendant;

(d) an account of the gross sale takings derived from all the 4-D operations and bettings undertaken by the Defendant or its agents in breach of the 1987 Agreement and for payment of 98% of the said gross sale takings to the Plaintiff;

(e) an injunction to restrain the Defendant whether by itself or through its officers, servants, agents or nominees or otherwise howsoever, save and except through the Plaintiff, from appointing any agents in respect of 3-D and 4-D operations in the State of Sabah pursuant to the said licence dated January 1995 granted to the Defendant under the Pool Betting Act 1967 or any renewals thereof;

(f) an injunction to restrain the Defendant whether by itself or through its officers, servants, agents, nominees or otherwise howsoever interfering in any way with the Plaintiff's conduct and management of all 3-D and 4-D operations in Sabah pursuant to the said licence dated January 1995 issued to the Defendant under the Pool Betting Act 1967, or any renewals thereof, and/or the Plaintiff's right to conduct and manage the same;

(g) damages;

(h) interest;

(i) costs; and

(j) such further or other Orders and relief as this Honourable Court deems just and proper

Dated the 17th day of February 1995.

The licence mentioned in para (a) above which was issued in January 1995 was of course in Bahasa Malaysia but an English translation of it was referred to and accepted by both parties as being a correct translation which is set out below and this licence is henceforth referred to as the said Federal licence.

TREASURY: KK/BP(J)/8.00/4/3/3-l JD. 1(4)
LICENSE PAYMENT; RM250,000.00

POOL BETTING ACT, 1967

LICENSE

(SECTION 5)

This license is issued by the Finance Minister, hereinafter known as "Minister", under section 5 Pool Betting Act, 1967, hereinafter known as "Act 384", to the Sandakan Turf Club, hereinafter known as "the licensee", whose registered office is at 1st Floor, Block A, Lot No. 3, Bandar Tong Huat, North Road, Sandakan, Sabah for the purposes of collecting, operating or developing pool betting that is pool betting Empat Nombor (4D) forecast governed by sections 10, 16, 17 and 28 of Act 384 and the conditions and prohibitions which is fixed in this license.

CONDITIONS AND RESTRICTIONS

1. This license is valid for the period of one (1) calendar year starting from 1st January 1995 and shall only be in force in Sabah only.

2. The premises of the licensee is at the Sandakan Turf club, Gelanggang Lumba Kuda, Jalan Sibuga, Sandakan, Sabah and it cannot be changed without the approval of the Minister.

3. The licensee must display a distinct notice board at a conspicuous place in the premises as specified by the second paragraph of this license, that displays and shows the type of business.

4. The licensee shall pay a license fee in accordance with the rate fixed under the Pool Betting Rules (License Fee) 1995.

5. The licensee shall deposit with the Government a sum of Ringgit Malaysia One Million (RM1,000,000.00) in the form of Treasury Bills or Government Securities that are approved as guarantee for monies won. The licensee must complete a letter of irrevocable power of attorney to the Minister which gives the Minister absolute discretion to sell or dispose

other Treasury Bills or Government Securities that are approved without referring to the licensee and also to use the proceeds to pay monies that are won which the licensee has failed to pay due to some dispute or other reasons. Any amount that is used by the Minister must be compensated by the licensee immediately so that the deposited amount remains at ringgit Malaysia One Million (RM1,000,000.00) at all times.

6. The licensee shall pay gambling tax of 7% and pool betting monies of 11.5%, in accordance with the rate that is determined by the Minister from time to time, other than payments of taxes on income, company, development and others as required by the relevant Laws.

7. The licensee shall produce, for the Ministers approval, the Scheme for every type of pool betting and variations that is promoted and organized by him. The type of pool betting and variations where a Scheme has not or was not approved by the Minister cannot be promoted or organized by the licensee.

8. The Minister has the right to determine the amount and time for having the draw from time to time depending on the type of pool betting Scheme that has been approved.

9. The licensee shall produce a list and details of agents that are appointed by him for the Minister's approval. The agents whose appointment has not or was not approved by the Minister cannot operate.

10. The licensee shall only allow his agents to carry out their operations from 10.00 a.m. to 7.00 p.m. only.

11. The licensee shall ensure that his agents abide all conditions and prohibitions that is fixed by the Minister from time to time.

12. The licensee shall maintain and prepare an updated Registration Book that contains a list of agents and one Registration Book that contains a list of workers including his agent's workers in accordance with the details fixed by the Minister from time to time.

13. The licensee cannot allow any person, other than his workers or his agent's workers, to carry out any businesses relating to the abovesaid pool betting.

14. The licensee cannot carry out any financial dealings relating to the abovesaid pool betting save in the premises in paragraph 2 of this license.

15. The licensee cannot carry out any business or other activities except in relation to the abovesaid pool betting at the premises that is specified in paragraph 2 of this license.

16. The licensee can only sell the abovesaid pool betting tickets in Sabah only.

17. The licensee is fully responsible for the payment of monies that were won and not his agents.

18. All tickets that are sold to the public shall contain the following words:

"GAMBLING IS ILLEGAL IN ISLAM";
AND "ALL PRICES ARE FULLY GUARANTEED"

19. The licensee is also governed by Unclaimed Moneys Act 1965. Any money that is not claimed, as provided in the relevant pool betting Scheme, shall be put into the Government's revenue.

20. The licensee shall allow any public officer that is given the proper power by the Minister to inspect any accounts or balance sheets of the licensee or his agents.

21. The licensee shall give, within the specific time fixed, any statement or information that is required by my officer from the Malaysian Treasury as stated in a written notice that is issued by the said officer.

22. Membership of licensees or its management bodies cannot be changed or replaced without the consent of the Minister.

23. The licensee cannot assign or transfer, whether wholly or part of, any rights, duties or obligations that is provided in this license.

24. Any public officer that is properly appointed by the Minister, has the right to attend and take part in any meeting or dealings relating to the abovesaid pool betting that is promoted or organized by the licensee or his management body.

25. The minister can at any time add, vary or cancel any condition or restriction that is stated in this license.

26. The Minister can at any time cancel this license without giving any reason.

Made in Kuala Lumpur on ... JANUARY 1995

SIGNED
(YUSOF BIN SALLEH)
Secretary, Administration Division
On Behalf and in the name of,
Finance Minister

The agreement dated 26 November 1987 also referred to in para (a) above has been at the heart of this case with its construction or interpretation being highly controversial; it is set out below in full for ease of reference as follows and is also referred to hereafter as the said agreement:

THIS AGREEMENT is made this 26th day of November 1987 BETWEEN KELAB LUMBA KUDA SANDAKAN (SANDAKAN TURF CLUB) P.O. Box 519, 90007 Sandakan in the State of Sabah, Malaysia, a society duly registered under the Societies Act (hereinafter called 'the Club' which expression shall include its successors and assigns) of the one part, AND SABABUMI (SANDAKAN) SDN BHD of Lot 8 1st Floor, Towering Industrial Centre, 7 Km, Jalan Penampang, P.O. Box 13803, 88844 Kota Kinabalu, in the State of Sabah, Malaysia, a limited company incorporated under the Companies Act (hereinafter call 'the Company' which expression shall include its successors and assigns) of the other part.

WHEREAS the Club intends to acquire a piece of land in the district of Sandakan for the setting up of a race course with racing and betting facilities.

AND WHEREAS the Club has been granted exemption from the provision of the Gaming Ordinance Cap 50 by the relevant authority in respect of any totalisator or parimutuel to be promoted or operated by it on the proposed Race Course (hereinafter referred to as 'the said Exemption')

AND WHEREAS the Club has also been granted the necessary licence to promote and organize public lotteries (including sweepstakes 3-D and 4-D) in any part of Sabah under the Gaming Ordinance Cap. 50 Sabah (hereinafter referred to as 'the said Licence')

AND WHEREAS the Parties hereto have agreed to co-operate in the construction of the race course and the management of racing facilities in Sandakan and the setting up of the betting facilities in accordance with the terms and conditions hereinafter provided.

NOW THIS AGREEMENT WITNESSETH as follows:

1. In consideration of the terms and conditions hereinafter contained the Parties hereto hereby agree to co-operate with each other in the construction of a race course and the management of racing facilities in Sandakan and the setting up of betting facilities.

2. The company hereby undertakes with the Club as follows:

   (a) To acquire for the Club 100 acres of land from the Sandakan Municipal Council or State Government situate at a prime and freely accessible location in Sandakan (hereinafter referred to as 'the said Land') and to arrange for its proper survey and to pay all survey fees and incidental costs, land costs or premium, and costs of issue and registration of the title deed for the said Land in the name of the Club or its trustees.

   (b) To construct on the said Land a race course of a standard approved by the relevant authorities, and complete with grand-stand, stables and other facilities and amenities which are necessary for the conduct of pony and thoroughbred horse racing, and in accordance with such

plans and specifications which may be approved by the local authority or the Ministry concerned, and to pay all costs and expenses related thereto.

(c) To set up the betting machines at the race course and also betting facilities off course, as may be permitted under the licence granted to the Club, and to pay all costs and expenses related thereto.

(d) To manage and maintain in good conditions the race course and all buildings, structures and fixtures thereon and all betting machines and facilities related thereto.

(e) To operate and manage all pony and thoroughbred horse racing on the race course in accordance with the rules of racing of the Club or as may be adopted or approved by the Club from time to time.

(f) To pay to the Club as its share of the revenue in the joint venture herein 2% of the gross sale takings derived from all bettings on the races, 3-D and 4-D operations and other bettings undertaken by the Company or its authorized agents, on the races.

3. The Club hereby undertakes with the Company as follows:

(a) To grant to the Company the exclusive rights to run all pony and thoroughbred horse racings on the said race course.

(b) To grant to the Company the exclusive rights to conduct and manage all bettings on the races at the race course and to conduct and manage all 3-D and 4-D operations related to such races throughout the State of Sabah.

(c) To sublease the said Land to the Company for a term of twenty (20) years commencing from the date of completion of the race course thereon, at the nominal annual rent of Malaysia Ringgit One only (S1/-) for the purposes set out in paragraphs (a) and (b) aforesaid.

(d) The club shall undertake public relations, study tours, promote the breeding of ponies and horses, grow and produce suitable animal feeds, create racing interests and do all things to support the pony and horse racing industry, and provide sporting activities, playing fields and arenas for the members of the Club and the general public and give donations to patriotic, charitable educational and benevolent purposes, and to employ and pay personnels engaged in these activities.

4. Upon the expiration of the twenty (20) years sublease under Clause 3(a) aforesaid the Company shall deliver up vacant possession of the said Land, the race course and all buildings, structures and fixtures thereon, together with all on-course and off-course betting machines, and all other

amenities and facilities forming part of the race course and racing and betting operations, in reasonably good repairs and conditions, natural wear and tear being excepted. The Company and its agents and employees shall also cease all 3-D, 4-D and other betting operations connected with the race course. The company shall have no claim whatsoever against the Club for capital outlays expended by the Company on the race course and the betting facilities.

5. The Company in carrying out its undertaking under Clause 2(a), 2(b) and 2(c) shall maintain constant consultations with the Club in order to ensure that all constructions and installations are acceptable to all parties concerned.

6. The Club shall co-operate closely with the Company in the acquisition of the said Land, and sign all documents and forms which may be necessary, provided that all expenses and fees related thereto shall be borne by the Company.

7. Subject to the provisions of Clause 8 herein the 2% gross sale takings payable by the company to the club under Clause 2(f) aforesaid shall be paid weekly and the payment date shall be the first business day one week after the close of the previous week's account, with a grace period of not more than seven (7) days. If the Company defaults again after the grace period then the payment date shall be extended for not more than one (1) month subject to the payment of interest on the amount due and payable at the rate of 1% per month with daily rests. If the Company defaults again after the one (1) month extension then the club shall be entitled to give a three (3) months notice in writing to the Company and determine this Agreement and upon such termination the Company shall comply with all the terms as provided in Clause 4 aforesaid as if the twenty (2) years sublease has duly expired, without any claim whatsoever against the Club for loss and damages suffered or for capital outlays expended by the company on the race course and the betting facilities.

8. The company may defer payment of the aforesaid 2% gross sale takings during the first three months of operation and commence actual payment after the third month, provided that the said 2% sale taking for the first year shall be fully paid before the end of the year. All payments thereafter shall be in accordance with Clause 7 aforesaid.

9. In carrying out all 3-D, 4-D and other betting operations whether on-course or off-course, the Company, its agents and employees shall at all times comply with the laws for the time being in force in Sabah, and the terms and conditions wet out in the licence granted to the Club and with all orders and directions which may be issued by the licensing authority or the Police from time to time. In the event of any defaulter offence being committed the Company shall pay and settle all fines and penalties which may be imposed and indemnity and keep indemnified the club its officials and members against the same.

10. The Company shall keep proper and up to date accounts of all betting operations and shall make them available for inspection by the club or its officials or agents at all times. The company shall appoint as its auditors the firm of Yap Lean & Co., Certified Accountants of Kota Kinabalu.

11. (i) If the said Exemption granted to the Club under the Gaming Ordinance is cancelled by the Authority concerned due to no fault of either the club or the company, then this Agreement shall be determined forthwith. If this event happens after the Company has been in operation of the race course and betting facilities for ten (10) years or more, then the said Land together with the race course and all buildings structures and fixture thereon, together with all on-course and off-course betting machines, and all other amenities and facilities forming part of the race course and racing and betting facilities shall revert back to the club as is sole properties and the company shall have no claim whatsoever against the Club for capital outlays expended by the Company on race course and the betting facilities. If this event happens after the company has been in operation of the race course and betting facilities for less than ten (10) years then the Parties shall negotiate for the take over of the said Land and the race course and all betting facilities with the view of fair compensation to the company or the loss of the capital outlay. If negotiations should break down then this matter shall be submitted to arbitration in accordance with the laws for the time being in force in Sabah.

(ii) However, if the said Licence issued to the club under the Gaming Ordinance is cancelled by the parties concerned due to no fault of either Club or the Company, in such event the Company shall still be entitled to operate and manage the ponies and thoroughbred horses racing on the race course as permitted under the said Exemption and in accordance with the terms and conditions of this Agreement which are applicable thereto.

12 (i) If the said Exemption is cancelled because of the fault of the Club, then this Agreement shall be determined forthwith and upon such determination the Club shall compensate the Company for the loss of capital outlays expended in the race course and betting facilities.

(ii) If only the said Licence is cancelled because of the fault of the Club, then this Agreement shall still subsist and be valid and binding upon the parties in so far as the same relates to the operation management of the ponies and thoroughbred horses racing on the race course provided however that in such event the Club shall compensate the Company for the loss of capital outlays expended on the race course and betting facilities.

13. (i) If the said Exemption is cancelled because of the fault of the Company, then this Agreement shall be determined forthwith and upon such determination the said Land together with the race course and all building, structures and fixtures thereon, together with all on-course and off-course betting machines and all other amenities and facilities forming part of the race course and racing and betting facilities shall revert back to the club as its sole properties.

(ii) If only the said Licence is cancelled because of the fault of the company, then this Agreement shall still subsist and be valid and binding upon the parties in so far as the same relates to the operation and management of the ponies and thoroughbred horses racing on the race course provided however that in such event the Company shall compensate the Club an amount equivalent to the prevailing market value of the buildings, structures and fixtures on the race course, together with all on-course and off-course betting machines and all other amenities and facilities forming part of the race course and racing and betting facilities. Such valuation shall be based upon a valuation carried out by a chartered valuer to be agreed by the parties hereto.

14. Officials of the club shall attend and supervise at all race meetings conducted or managed by the Company and such club officials shall be paid such allowance by the Company as may be agreed upon from time to time.

15. The Company shall be solely liable for all claims for losses and damages which may be made by members of the public arising out of the race meetings conducted or managed by the company, and to indemnify and keep indemnified the club its officials and members against the same. The company shall take out such public liability insurance as may be suitable.

16. A representative of the Club shall be appointed a director to sit at the board of Directors of the Company, with no voting power.

17. All the 3-D, 4-D and the other betting operations agents whether on-course or off-course, shall be appointed by the Company on behalf of the Club, the licence holder. The appointment letter for each agent shall be signed by the Company which shall be entitled to hold such deposit which may be made by the agents, and to be solely liable for all losses arising out of such 3-D, 4-D or other betting operations, and to indemnify and keep indemnified the clubs its officials and members against the same.

18. The Company shall at all times pay all Government duty and gaming tax which may be imposed or assessed by the authorities concerned on the racing and betting operations, and indemnify and keep indemnified the Club, its officials and members against the same.

19. The Company shall not involve the Club in any financial liability whatsoever while in the development of the race course or in the subsequent management of the race course and racing and betting operations. Any loan obtained for the development shall be the sole liability company of the Company.

20. This Agreement shall commence on the date of its execution and the Company shall enter into such agreement which may be necessary to secure the said Land for the Club within seven (7) years thereafter, and shall complete the construction of the race course and other racing and betting facilities within two (2) years after the approval of all development plans by the local authority or Ministry concerned.

21. In the event of any dispute arising out of the construction or operation of this agreement the Parties hereto shall endeavour to negotiate a settlement initially and if a settlement cannot be reached the dispute shall be submitted to arbitration in accordance with the laws for the time being in force in Sabah.

IN WITNESS WHEREOF the Parties hereto have hereunto set their hands the day and year first above written.

It will have been noticed that the appellant, (hereafter called the said operator) was to build the race course and its buildings at its cost practically from scratch by acquiring or buying the necessary land etc, and in consideration therefor, the said operator would be given the exclusive right to operate and manage all the gaming facilities for the Sandakan Turf club, hereafter called 'the said turf club'. The cost said to be about RM18 million can be said to be fairly enormous but the duration of the exclusive right would be for about 20 years, a fairly long-term project as contemplated by both parties as shown in the clauses of the said agreement.

The gaming that was subsequently carried on or operated was in pursuance of a licence issued by the Sabah Government under Sabah's own Gaming Ordinance of 1930, Cap 50 to, and also by way of the granting of certain exemptions from the provisions of the Gaming Ordinance in favour of the said turf club on or shortly after 14 February 1984 in respect of "on-course" betting (by way of the said exemption) which comprised pari-mutual and totalisator betting. The said turf club was also permitted by the Government to carry on off-course betting by means of the licence mentioned just now comprising public lotteries, including 3-Digit and 4-Digit draws. The said Gaming Ordinance is hereafter called 'the said Gaming Ordinance of Sabah'.

On 14 April 1992, the Government of Sabah under the said Gaming Ordinance of Sabah cancelled the licence dated 14 February 1984 in respect of the off-course betting and issued a new licence which apparently differed from the cancelled licence with a new condition which said:

> this licence shall be personal to the licensee or shall not be transferred in any manner whatsoever.

On the heels of this new licence ie, on 15 April 1992, "Modification of Laws (Common Gaming Houses, Lotteries, Betting, Betting and Sweepstake Duties and Racing (Totalisation Board) (Extension to the States of Sabah and Sarawak) Order, 1991" came into force for the State of Sabah by virtue of which, the said Gaming Ordinance of Sabah was repealed and all Federal statutes dealing with gaming or betting or racing mentioned in the Order applied to Sabah. This Order of 1991 was made possible by certain provision of Malaysia Act 1963. The new licence dated 14 April 1992 issued under the Gaming Ordinance of Sabah was saved by para. 12 of the said Order of 1991 (hereafter called the said Order of 1991) which read as follows:

> Provided that any exemption, permit or licence issued or granted under the Gaming Ordinance Sabah or the Gambling Ordinance, Sarawak on or before the commencement of this Order, shall continue to remain in full force and effect under the respective Ordinances under which it was made, and shall continue in force until it expires, or is varied, amended or revoked under the said laws. For these purposes only, the respective Ordinances shall continue to be in full force and effect.

Business was however carried on as usual between the said turf club and the said operator and I have ascertained from both parties that the said condition of the new licence dated 14 April 1992 about the personal nature of the licence did not affect such business in any way or in such a way as to give rise to any controversial claim as contended in the proceedings between the two parties. I have mentioned all this to show the preparedness of both parties to commit themselves to the said agreement for the purpose of dealing with the question of implied terms later.

Relations nonetheless between the parties came to a head when the Federal Government decided to implement the Federal statutes in Sabah as extended by the said Order of 1991 when the Federal Ministry of Finance wrote to the said turf club on 12 December 1994 informing the said turf club that its gaming activities should cease by 31 December 1994 and thereafter they were to be carried on under a Federal licence. The Federal Ministry of Finance, the said turf club and the said operator began a flurry of activities among themselves in regard to such a Federal licence.

Tripartite meeting and correspondence ensued, and in January 1995, the said Federal licence as set out above was issued to cover all the gambling activities of the said turf club.

After the said Federal licence was issued, differences between the parties arose leading to the said originating summons being filed as set out earlier.

After a hearing on merits, the High Court gave judgment for the said operator and a copy of the order of High Court dated 15 April 1995, yet unsealed but apparently acceptable to both parties is set out below:

> **UPON THE APPLICATION** of the Plaintiff abovenamed **AND UPON READING** the Originating Summons dated the 17th day of February 1995 and the Affidavit of Tuan Foo Fat affirmed on the 17th day of February 1995 and the Affidavit in Opposition of Datuk Yap Pak Leong affirmed on the 8th day of March 1995 and the Affidavit in Reply of Tuan Foo Fat affirmed on the 28th March 1995 and all filed herein **AND UPON READING** Roderic Fernandez Esq of Counsel for the **Plaintiff** and Valentine Willie Esq. of Counsel for the Defendant **IT IS DECLARED AND ORDERED** as follows:
>
> 1. that the Licence dated January 1995 being the reference KK/BP(J)8.00/4/3/3-1 JD.1 (4) issued by the Federal Minister of Finance of the Government of Malaysia to the Kelab Lumba Kuda Sandakan (Sandakan Turf Club) under the Pool Betting Act, 1967 and any renewals thereof is within the scope of the Agreement between the Kelab Lumba Kuda Sandakan (Sandakan Turf Club) and Sababumi (Sandakan) Sdn. Bhd dated 26th November 1987;
>
> 2. that the Kelab Lumba Kuda Sandakan (Sandakan Turf Club was and still is in break of the provisions of the said Agreement which confer exclusive right to Sababumi (Sandakan) Sdn Bhd to conduct and manage all 3-Digit (3-D) and 4-Digit (4-D) operations in and throughout the State of Sabah;
>
> 3. that the Kelab Lumba Kuda Sandakan (Sandakan Turf Club) do pay Sababumi (Sandakan) Sdn Bhd damages to be assessed by the High Court, Kota Kinabalu in respect of the said breach; and
>
> 4. that the Kelab Lumba Kuda Sandakan (Sandakan Turf Club do pay Sababumi (Sandakan) Sdn Bhd costs of this action to be taxed.
>
> Dated the 15th day of April 1995.

The said turf club appealed to the Court of Appeal. The issues were identified and accepted by both parties as the crucial issues and after hearing arguments on such issues, the appeal was allowed, hence the further appeal before us by the said operator.

The Federal Court on 14 December 1996 in granting leave to appeal framed the questions or issues which ought to be heard as follows:

> (3) The questions or issues which ought to be heard in the appeal shall be:

(i) whether the Court of Appeal was correct in law and on the evidence in holding that the High Court was wrong in implying a term in the 1987 Agreement in the manner it did;

(ii) whether the Court of Appeal was correct in law and on the evidence in holding (if it did) that the 1987 Agreement was tainted with illegality by reason of breaches of the Gaming Ordinance Cap. 50 of Sabah, the Pool Betting Act, 1967 or otherwise;

(iii) if the 1987 Agreement was so tainted with illegality, what were its consequences in civil law generally and on the 1987 Agreement particularly?

(4) the costs of this Motion shall be costs in the cause.

GIVEN under my hand and the Seal of the Court this 14th day of November 1996.

With regard to the first question set out above, it will be remembered that the High Court by its order had declared that the said Federal licence issued in 1995, was within the scope of the said agreement made in 1987 by way of an implied term, which may be summarised as that so long as the said turf club was allowed or licensed under whatever laws, to conduct off-course and on-course betting, the said operator could continue to have the exclusive right to conduct and manage such off-course and on-course betting for the periods as provided in the said agreement. The said operator submitted that such an implied term applied and the said Turf club submitted to the contrary. The High Court agreed with the said operator in implying the term but the Court of Appeal agreed with the said turf club and reversed the decision of the High Court on this point. Now it is for us in the Federal Court to decide this question of implied term.

The background of this case has been described at length by the judges of both the High Court and the Court of Appeal, and I will not repeat in extenso what they have said except to refer to said parts of the facts as and when necessary. I will give my own view too on the law of implied terms.

Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract. The implied term contended for in this appeal belongs to this type and much more about this later.

The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law I mean that a large number of specific implied terms have been held in to arise from previous

decided cases on certain specific facts. Such *ratios decidendi* in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide safe system of work. Many of such decided and specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasise that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly it is not dependent on the court having to draw an inference explained above.

The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s. 92(e) of the Evidence Act 1950 seems to be custom-made to provide logistical support for this particular type of implied term. It will be remembered that s. 92(e) aforesaid is one of the exeptions to the rule against evidence to contradict or vary any terms of a written contract.

Reverting to the first type of implied term which is dependent on a court's drawing an inference as explained above, there are two tests to fix the parties with such an intention ie, that the parties must have intended to include such an implied term in the contract. The first test is a subjective test as stated by the Mackinnon, LJ in *Shirlaw v. Southern Foundries* (1928) Ltd. [1939] 2 KB, 206, 227, that such a term to be implied by a court is "something so obvious that it goes without saying so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of course'."

The second test, is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastborne) v. Cooper* [1941] AC 108, 137, that in regard to an implied term, "... it can be predicated that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended." Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw* case *supra,* Shirlaw who was appointed the managing director

by the defendant company for ten years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the ten years' term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for ten years to Shirlaw as both parties must have intended it at the time when making the agreement.

The testy answer to the question of the officious bystander of "Oh, of course" spoken of by Mackinnon, LJ, was described equally elaborately by Scrutton, LJ in *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.* [1918] 1 KB 592 at 605 as: "... Of course, so and so will happen, we did not trouble to say that, it is too clear."

Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor* [1977] AC 239, 254 spoke of an implied term as a matter of necessity, so that the element of "business efficacy is inseparable". Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council* [1977] 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai, J (as he then was) in *Yap Nyo Nyok v. Bath Pharmacy Sdn. Bhd.* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of "Oh, don't talk rubbish."

The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained. In doing so, I will not set out the evidence below in detail except to refer to such parts of it as and when necessary, as after all this matter is not likely at all to go elsewhere from this court, as long as the parties and their counsel, and the courts below are apprised of detailed facts.

The essence of the intention for both parties in the said agreement is for the said turf club to grant an exclusive right to said operator to conduct off-course and on-course betting or gaming for 20 years in consideration of payment to the said turf club of 2% of all gross takings from such betting activities, (not 2% of gross profit or net profit after tax) by the said operator, and in further consideration of the promise by the said operator at its cost to buy or acquire

100 acres of land to build a race course, construct buildings for the purpose, and to manage and operate such gaming activities.

In view of which has been stated, it was not surprising that learned counsel for the said operator was referring to the business of the parties as a joint-venture.

There can be no doubt that both parties had decided to commit to each other in regard to such business on a long-term basis, apparently 20 years as the land to be acquired or bought at presumably enormous cost in Kota Kinabalu was to be transferred to the name of the said turf club virtually gratis which would then execute a lease to the said operator for 20 years also virtually gratis at an annual rent of RM1. The contribution of the said turf club comprised the licence and exemption from the provisions of the said Gaming Ordinance of Sabah obtained by or granted to the said turf club respectively.

Thus at the time of negotiating for the said agreement or signing the said agreement, in view of the circumstances pointed out above, if the officious bystander had asked the question whether such exclusive right to operate off-course and on-course betting for 20 years would continue if the licences and the said exemption were issued or granted by any other laws ie, by any law other than the said Gaming Ordinance of Sabah, both parties would have answered, "Oh, of course."

Further, the answer to the officious bystander would give business efficacy to the said business between the parties in view of what has been stated above, ie, it would give, in other words, to both the parties the desired result of both parties under the said agreement so that the said business could carry on on that contemplated long-term basis at virtually no cost to the said turf club but at tremendous cost to the said operator.

The court below, after setting out the cases on the point of implied term including the *Shirlaw* case, the *Reigate* case, *BP Refinery* case *supra*, held that the High Court was wrong in implying such an implied term, stating that what appears to be the gist of its reasoning in its judgment at p. 194 of the Appeal Record.

> In our judgement, the learned judge adopted a wholly erroneous approach to the case. This is not a case where detailed terms were omitted. On the contrary, the parties here have spelt out their rights and obligations very clearly and made provisions for certain contingencies.
>
> The fact that an event has occurred for which the parties made no provision in the agreement is not a valid reason in law for the court to interfere and imply a term into their contract. In the words of Mason J in *Codelfa (supra)*,

this is a case where each party was "prepared to take his chance in relation to an eventuality for which no provision is made."

Yet the judge acted to provide for an event which the parties were content to leave untouched because they had specifically made provisions for cancellation of the licence if another contingency arose.

(See clause 11 of the agreement). This is precisely what the law forbids.

It is true that an event has occurred for which the parties made no provisions in an agreement containing nonetheless careful and detailed obligations set out therein is not a valid reason for a court to interfere with and imply a term into this agreement, however with great respect it could very well be also such a factual situation that will prompt one party to the contract to contend for such an implied term whereupon the court would have to decide whether it should imply such a term by employing the two tests which will have to be satisfied to determine the contention. Let it be remembered that the most careful of men sometimes may overlook something that should have been very obvious.

The mention by the Court of Appeal of express provisions in the said agreement for cancellation of licence in the above passage seems to suggest, if I may conjecture that such express provisions already cover the present situation in this appeal ie, the issuance of the said Federal licence in place of the earlier licence issued under the said Gaming Ordinance of Sabah which must have been cancelled by the Federal Government to make way for the said Federal licence. Therefore it will necessarily militate against the inclusion of such an implied term contended for. I will now examine this suggestion.

Such provisions in the said agreement provide for (a) cancellation of the licence and for that matter, cancellation of the exemption by the Government or authority, through no fault of either the said turf club or the said operator; (b) cancellation of the same because of the fault of the said turf club; and (c) cancellation of the same because of the fault of the said operator.

Courts often and generally, look at the real nature of the transaction rather than the form of the transaction unless prevented to do so by judicial precedent or any statutory provision. The word "cancellation" referred to above refers to a decision by the licencing authority not to allow to go on to do something which the parties concerned have earlier agreed or arranged to do or to be done; this is the ordinary meaning of the word "cancellation". In other words, the same word refers to a decision not to allow to carry on on-course and off-course betting which the parties had agreed or arranged to do or to be done earlier. The real nature of the transaction is that both parties had agreed or arranged for the conduct of off-course and on-course betting.

Thus, cancellation of the licence in connection with the express provisions for the cancellation of licence in the said agreement can only mean the decision, of the Government or the licensing authority not to allow to go on with the off-course and on-course betting which has been going on hitherto either through no fault of the said operator, or the fault of the said turf club or through no fault of either the said turf club or the said operator.

The situation described in the immediately preceding paragraph ie, the situation envisaged in the said agreement as contained in those express provisions for cancellation of licence has not occurred. What the Minister of Finance wanted was for the said turf club to carry on the on-course and off-course betting under the said Federal licence – a sort of old wine in new bottle, and not to stop or disallow such betting. Therefore these express provisions could not any way be inconsistent with or inhibitory against the implied term contended for. Thus the express provisions for cancellation of licence also do not cover the situation arising from this appeal as explained above and are thus immaterial for the purpose of considering the question of the implied term.

On the point of implied term, the Court of Appeal, in my view, with respect, has gone wrong and the decision on the same point by the High Court should be upheld. This is of course not the end of this case as the point of illegality remains to be considered.

It may not be out of place at this juncture to deal with a preliminary objection of learned counsel for respondent to the effect that certain issues or grounds raised in the memorandum of appeal *viz* ground (1)(d) and ground (2)(h) of the said memorandum were outside the scope of the questions or issues in respect of which leave to appeal was granted by the Federal Court. These two grounds or subsidiary grounds refer to an "identical, if not substantially similar rights" given to a third party, *viz* Everise Ventures Sdn Bhd to operate gaming activities as previously operated by the said operator until the said agreement was terminated by the said turf club. The matter concerning the said Everise Ventures Sdn Bhd was in evidence before the High Court which the Court of Appeal, by the said grounds (1)(d) and 2(h) was said to be wrong in failing to consider. Parties were told then that the decision on the preliminary objection would be reserved till the delivery of the judgment of the court on this appeal. I now give my decision on it.

The issues or questions for which leave to appeal was granted by Federal Court have been set out earlier, *viz* implied term and illegality of contract.

Under r. 108(1)(c) of the Rules of the Federal Court 1995, the Federal Court may determine or frame the questions or issue which ought to be heard in the appeal; in my view, this discretionary power given statutorily must be

given effect to, in other words, only the issues or questions thus framed would be heard or entertained.

The approach I would adopt when it is disputed whether any stated ground in the said memorandum of appeal is outside or not the scope of issues that the Federal Court framed in granting leave is, whether such ground is, *prima facie*, necessary to enable the court to decide the said issue with precision, if it is not, the ground is thus outside the scope.

The matter of another similar agreement or arrangements between the said turf club and Everise Sdn. Bhd. though seemingly relevant factually, does not however satisfy this test. An illegality if established, does not become less than an illegality when the perpetrator commits another illegality. Further, the question of lack of *bona fides* on the part of the said turf club, arising from that other illegality is not a point which the court would have to consider in this appeal. A defendant, like the said turf club in the originating summons filed in High Court, is always entitled to defend an action by setting up the plea of illegality of contract even though he participated in it, or even if he has masterminded it. The question of *bona fides* for setting up such a plea can not arise.

I therefore would uphold the preliminary objection and the court would therefore strike out ground (1)(d) and ground (2)(h) from the memorandum of appeal herein.

Dealing with the point of illegality, the argument of the parties and the reasoning of the court below in regard thereto, a modicum of relevant issues or facts would have to be set out.

When the said agreement was made on 26 November 1987, in relation to off-course and on-course betting, apart from the said exemption granted to the said turf club from the compliance of certain provisions of the said Gaming Ordinance of Sabah, the licence issued pursuant to the said Gaming Ordinance of Sabah contained no restriction at all as regards its assignment or even transfer. There was a change on 14 April 1992 and the said licence was amended to include *inter alia*, a condition which provided that "... licence shall be personal to the licensee and shall not be transferable in any manner whatsoever". The condition, in the event that had happened, did not preclude the parties to the said agreement from carrying on the business like before when there was no such a condition. From my inquiry of both learned counsel, it would appear that no dispute or claim had arisen which would require this court's adjudication, in respect of the business between the parties for the period after the date of 14 April 1992 aforesaid up to the issue of the Federal licence in January 1995. It would be therefore academic for this court to

determine whether the said agreement had become illegal and unenforceable against the said turf club in respect of the amendment to the licence issued under the said Gaming Ordinance of Sabah. I turn my mind therefore to the said Federal licence.

Under condition 23 of the said Federal licence it states: "The licensee can not assign or transfer whether wholly or part of any rights, duties or obligations that are provided in the licence." The condition is significant.

The said Federal licence was issued under Pool Betting Act 1967 with the licence thus issued, as a matter of common ground before us, covering both the on-course and off-course betting of the said turf club.

In connection with the common ground aforesaid, I believe both learned counsel seemed to assure me in effect or to the effect that the validity of the said Federal licence was never in doubt, and it was not an issue with all parties concerned and their concern was the enforceability or otherwise of the said agreement due to alleged illegality. The Pool Betting Act 1967 is hereafter called the said statute.

I now turn my attention to some of the principles of illegality for the purpose of this appeal which I will now discuss and in the light of such discussion, I will make my own decision on the factual mould before the court.

For reasons which will be apparent later, I refer to s. 24 of the Contracts Act 1950, the source of Malaysian law on illegality of contract.

s. 24 **What considerations and objects are lawful, and what not**

The consideration or object of an agreement is lawful, unless -

(a) It is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another;

or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Section 24 appears to me to have been drafted after some fine tuning of the common law on which it is based. At common law, contracts fitting in with the said s. 24(a) and (b) for contravening any law would be illegal for being against public policy, but in our Contracts Act 1950, the same contracts are covered by s. 24(a) and (b) ie, under two separate sub-sections so that s. 24, which also refers to public policy elsewhere in the section, deals with other contracts against public policy such as, as we know, contracts which interfere with administration of justice, contracts in restraint of trade etc, other than these two groups. Please see in this connection eg, Lord Wright's observation in *Vital Food Products Inc v. Unus Shipping Co.* [1939] AC 277, about public policy being the basis for the non-enforceability of contracts rendered illegal by statutes.

It would be necessary to set out s. 5 and s. 21 of the said statute which all parties have heavily relied on. They are set out below:

> 5(1) Unless there is established a Board under section 6, the Minister may issue a licence to a person for the collection, operation or promotion of pool betting.
>
> (2) The Minister may refuse to issue or renew a licence to any person without assigning any reason and his decision shall be final.
>
> (3) A licence issued under subsection (1) -
>
> (a) shall be in such form as the Minister may think fit;
>
> (b) shall be subject to the payment of such fee for its issue or renewal as may be prescribed;
>
> (c) shall be valid for one calendar year only and may be renewed from year to year from the date of expiration of the licence;
>
> (d) shall be subject to such conditions or restrictions as the Minister may impose from time to time or during the currency of the licence;
>
> (e) may be revoked by the Minister during the currency of the licence without assigning any reason.
>
> 21(1) Any person who -
>
> (a) makes or enters into a bet upon the result of a prescribed event, whereby he agrees to pay the other party to the said bet, if the latter should win the bet, a sum of money the amount of which is dependent upon the result of the working of the totalisator on the said event;

(b) sells or offers for sale, or who purchases from any person referred to in paragraph (a), any ticket, coupon, card or thing entitling or purporting to entitle the purchaser or holder thereof to any interest in the result of the working of the totalisator on any prescribed event; or

(c) makes any contract or bargain of any kind to pay or receive money upon any event determined or to be determined or to be determined by the result of the working of the totalisator on any prescribed event,

shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding one year or a fine not exceeding one thousand ringgit or to both.

(2) Subsection (1) shall not apply to the licensee or the Board or any officer, agent or employee of the licensee or the Board while engaged in the lawful conduct of any totalisator for pool betting or of pool betting as such in accordance with this Act, the licence issued under section 5 or an approved scheme.

What has been in serious dispute is whether the said agreement is illegal and unenforceable, the said turf club says it is, but the said operator takes the opposite view. I will further discuss my view.

At common law, a contract may be illegal by common law or by statute, in either case the contract is unenforceable. It is to be borne in mind that s. 24(a) of the Contracts Act 1950 involves the consideration and/or object of a contract being forbidden by law, and "law" means common law or any statute. Thus, under s. 24(a) aforesaid, an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act forbidden by law, and this, in my view is the culled essence of some part of the common law on illegality of contract, which says in a nutshell that a contract to do an act illegal by statute or prohibited or forbidden by statute is unenforceable and illegal. It is very important to remember that it is distinguishable from another aspect or question as to whether a statute prohibits any contract. It is illegal and unenforceable under s. 24(a) aforesaid because it is a contract involving consent of both contracting parties to do the very act prohibited or forbidden by statute. This position obtains as well when the terms of the contract amount inevitably to the same situation. Thus an agreement to commit an offence as set out in the Penal Code is the simplest of examples of an agreement to do an act prohibited by statute.

To decide if s. 24(a) makes a contract illegal and unenforceable in connection with a statute, and this bears repeating, one must find out first if the statute prohibits or forbids the act which the parties have contracted to do by the contract in question, and NOT whether the statute prohibits the contract or the making of the contract in question by the parties. This difference is real, though very subtle. In my view the failure to bear in mind this fine distinction has given rise to some difficulties.

Which then is the illegal act or forbidden act (if any) under the said statute that the said agreement is or could be said to be an agreement to do?

One can almost immediately pin-point from the facts and learned counsel's arguments the forbidden act or the illegal or prohibited act – it is the breach of a condition 23 of the said Federal licence issued under the said statute for the following reasons. The attributive words of "forbidden, illegal and prohibited" all mean the same thing, being mere variations of one another.

Now the said Federal licence must have been issued under s. 5 of the said statute which authorizes the Minister (of Finance) to issue it, subject to such conditions or restrictions the Minister may impose.

Now, s. 21 of the said statute provides for the betting activities which, it is common ground, cover the off-course and on-course betting in the said agreement and it also provides for the offences for said activities unless covered by a licence issued under s. 5 of the said statute. It provides further the said offences shall not apply to a licensee, his agent or employee if they conduct such betting activities lawfully in accordance with the provisions of the said licence, among other things. If they do not so conduct such betting activities, they, or any of them commit an offence under the said s. 21.

The act forbidden or prohibited by the said statute or made illegal by the said statute is therefore not conducting the off-course betting and on-course betting in accordance with the provisions of the said Federal licence and the word "provisions" of the licence means, of course, the conditions of the licence. Thus a breach of any condition, including condition 23 of the said Federal licence is the forbidden act under the said statute, a punishable offence under s. 21 as stated just now.

The breach of condition 23, has occured, it has been submitted, because the said agreement purportedly assigned wholly or partly of the rights of the said the said turf club granted by the Federal licence. It will be remembered that the said operator was granted the exclusive right to conduct the off-course and on-course betting by the said operator authorized under the said Federal licence which was granted to the said turf club. It would be quite impossible to say

that the obtaining of such exclusive right to operate the off-course and on-course betting is not an assignment wholly or partly of such rights granted to the said turf club by the said Federal licence. On what amounts to assignment of the rights of a licence, the number of authorities is legion, and just to name two cases in the Federal Court, see *Sundang Timber Co. Sdn Bhd v. Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 MLJ 200 FC and *Lo Su Tsoon Timber Depot v. Southern Estate Sdn. Bhd.* [1971] 2 MLJ 161.

Thus, I come to the conclusion that the said agreement is a contract or amounts inevitably to a contract to do a act forbidden or prohibited by s. 21 under the said statute.

Such being the case, there is no need to go into the question (hereafter called the distinguishable question) of whether the said agreement is a contract prohibited impliedly by the said statute, – on the distinguishable question, all the parties concerned have so much concentrated their energies. Out of deference to so many arguments advanced, allow me to make just a few observations as follows on that distinguishable question.

Where any contract is not a contract or does not amount inevitably to a contract to do an act forbidden by a statute, then, what in practice often triggers off the distinguishable question is, when one of the contracting parties has contravened some statutory requirement in the performance of the contract and one of the parties in court this time defends the action against him by raising this point of contravention of that statutory requirement. To determine this distinguishable question, it then becomes a matter of trying to discover the intention of the legislature by the interpretation of the statute, almost always by employing, as a major rule of interpretation, along with other rules, the rule of purposive approach as explained and adopted by Lord Diplock in *Kammins Ballrooms Co. Ltd. v. Zenith Instruments (Torquay) Ltd.* [1970] 2 All ER 871, HL. I need not set out those numerous cases except one case to be mentioned below later which all sought to find out the intention of statutes in order to find out whether a contract was prohibited impliedly. Incidentally, when a contract is expressly prohibited and this is not so often enacted, there is no need to discover the particular legislative intention at all. To revert to implied prohibition, the civil remedies or civil consequences following from the aforesaid contravention of some statutory requirement (ie, from the commission of some statutory offence,) are very far removed from the mind of any legal draftsman who often must have been very much preoccupied with drafting the statutory requirements and offences etc, of the statute or who could have considered such civil remedies or consequences as being outside the perimeter of his task. By such civil consequences or civil remedies, I mean, for the purpose of this appeal, whether the contract is prohibited impliedly thereby.

I will end my reasoning by citing the leading case of *St. John Shipping Corp. v. Joseph Rank Ltd* [1957] 1 QB 267, concerning the distinction between a contract to do an illegal act, (ie, s. 24(a) of the Contracts Act 1950) on the one hand and a contract which does not do so but which or the making of which is expressly and impliedly prohibited by a statute; the distinction I sought to emphasise earlier, and Delvin J said at p. 283 in this connection:

> The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here ... The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.

I therefore uphold the order of the Court of Appeal made herein, though for somewhat different reasons and would further dismiss the appeal with costs, with the sum deposited in court to be paid out to account of taxed costs. The appellant do further pay costs in the Court of Appeal, but each party herein is to bear its own costs in the High Court when the appellant herein succeeded but was therefore removed from its judgment seat by a new but permissible point of illegality on appeal to the Court of Appeal.

Zakaria Yatim FCJ:

There are two issues for the decision of this court. They are:

(1) (i) whether the Court of Appeal was correct in law and on the evidence in holding that the High Court was wrong in implying a term in the 1987 Agreement in the manner it did;

(2) (ii) whether the Court of Appeal was correct in law and on the evidence in holding (if it did) that the 1987 Agreement was tainted with illegality by reason of breaches of the Gaming Ordinance Cap. 50 of Sabah, the Pool Betting Act, 1967 or otherwise;

(iii) if the 1987 Agreement was so tainted with illegality, what were its consequences in civil law generally and on the 1987 Agreement particularly?

Before considering these issues, I propose to refer briefly to the facts. On 25 November 1983 the Sandakan Turf Club (the Club) was registered under the Societies Act 1966. It was formed to carry out gaming activity. At that time gaming was prohibited by the Sabah Gaming Ordinance (Cap 50). On 14 February 1984 the Club was exempted from the provisions of the Ordinance pursuant to s. 27(a). On the same date the Club was granted a licence to operate three digit and four digit lotteries. On 26 November 1987 a written agreement was concluded between the Club and the appellant, Sababumi (Sandakan) Sdn Bhd (Sababumi). On 21 September 1989, the Pool Betting Act 1967 (Revised - 1989) was extended to Sabah. On 14 April 1992, the Sabah Authorities cancelled the licence issued on 14 February 1984. On the date the licence was cancelled, the Sabah Authorities issued an amended licence. On 15 April 1992 the Ordinance was repealed by the Modification of Laws (Common Gaming Houses, Lotteries, Betting, Betting and Sweepstake Duties and Racing (Totalisator Board) (Extension to the States of Sabah and Sarawak) Order 1991. The Order however contained a proviso that the exemption and licence granted earlier under the Ordinance remained in force. In January 1995 the Federal Ministry of Finance issued a new licence to the Club under the Pool Betting Act. Sababumi continued to carry on off - course betting activities after the 1995 licence was issued. But its activities were stopped by the police.

Sababumi applied to the High Court in Kota Kinabalu for declaratory reliefs. It claimed that the 1995 licence was within the scope of the agreement. The High Court gave judgment for Sababumi. The Club appealed to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the Order of the High Court. Sababumi now appeals to this court.

In considering the appeal, I shall first refer to the agreement. The full text of the agreement has been reproduced in the judgment of the Court of Appeal and in the judgment of my learned brother Peh Swee Chin FCJ.

Under cl. 2 of the agreement, Sababumi was to buy 100 acres of land and to construct a race course on the land at its own expense. The land was to be registered in the name of the Club. The Club in turn agreed to sub-lease the land and the race course to Sababumi for a period of twenty years. Sababumi was given the exclusive rights to conduct and manage all bettings on the races at the race course and to conduct and manage all 3-D and 4-D operators throughout the State of Sabah. Sababumi was to pay 2% of its gross sale takings to the Club on a joint venture basis. Clause 11(i) states that if "the

said exemption granted to the Club under the Gaming Ordinance is cancelled by the Authority ... due to no fault of either the Club or the company, then the agreement shall be determined forthwith." Clause 11(ii), states that if the "licence issued to the Club under the Gaming Ordinance is cancelled by the parties concerned due to no fault of either the Club or the company, the company shall still be entitled to operate ... horse racing ... in accordance with the terms and conditions of this agreement."

I shall now consider the issue of implied term.

The Court of Appeal said that there are two categories of cases when determining whether a term ought to be implied in a contract *viz* Category 1 and Category 11. Category 1 comprises those relationships in which the court more readily implies a term in the contract when there is evinced a contrary intention. The test to be applied when implying a term in the relationships within Category 1 is necessity. Category 11 consists of cases not falling within Category 1, ie, where no special relationship such as those recognized by the law exists.

The Category test may be applied to determine an implied term. But I prefer to adopt the test laid down in *Moorcock* [1889] 14 P64; *Reigate v. Union Manufacturing Company Limited* [1918] 1 KB 592; and *Shirlaw v. Southern Foundries Ltd* [1939] 2 KB 206. In *Moorcock*, Bowen LJ said at p. 68:

> and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transactions such efficacy as both parties must have intended that at all events it should have. *In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men:* not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances. [Emphasis added]

In *Reigate* case, Scrutton LJ said at p. 605:

> The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. **A term can only be implied if it is necessary in the business sense to give efficacy to the contract:** that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated **some one** had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so

will happen: we did not trouble to say that: it is too clear.' Unless the court comes to some such conclusions as that, it ought not to imply a term which the parties themselves have not expressed. [Emphasis added]

In *Shirlaw* case, MacKinnon LJ said at pp. 227 and 228:

For my part, I think that there is a test that may be at least as useful as such generalities. If I may quote from an essay which I wrote some years ago, I then said; '*Prima facie* that which in any contract is left to be implied an need not be expressed is something so obvious that it goes without saying: so that, if, while the parties were making their bargain, **an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'**

At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Applying that in this case, I ask myself what would have happened if, when this contract had been drafted and was awaiting signature, a third party reading the draft had said: 'Would it not be well to put in a provision that the company shall not exercise or create any right to remove Mr. Shirlaw from his directorship, and he have no right to resign his 'directorship?' I am satisfied that they would both have assented to this as implied already, and agreed to its expression for greater certainty. Mr. Shirlaw would certainly have said: 'Of course that is implied. If I am to be bound by this agreement, including the barring of my activities under clauses 11 and 12 when I cease to be managing director, obviously the company must not have, or create, the power to remove me at any moment from the Board and so disqualify me from that post": and the company, which must be presumed to have been then desirous of binding him to serve them as managing director for ten years, would, I think, with equal alacrity have said: "Of course that is implied. If you were tempted by some offer elsewhere, it would be monstrous for you to be able to resign your directorship and, by so disqualifying yourself from being managing director, put an end to this agreement. [Emphasis added]

From the passages quoted above, there are two elements to be satisfied, namely, the business efficacy of the transaction, and the officious bystander test.

I shall deal with the first element.

The last recital to the agreement states that both parties to the agreement agreed to cooperate in the construction of a race course and the management facilities. The agreement was for a period of twenty years. I agree with Mr. T. Thomas, counsel for Sababumi, that the agreement was a cooperation agreement between two commercial bodies for a period of twenty years. Under the agreement, Sababumi was to acquire 100 acres of land and to construct

on the land a race course. All costs and expenses were to be borne by Sababumi. Sababumi would pay the Club 2% of the gross sale takings derived from all bettings. The business of operating all bettings on the races at the race course and all 3D and 4D is described in the agreement as a joint venture business. Clause 2(f) states,

> (f) To pay to the Club as its share of the revenue in the **joint venture** herein 2% of the gross sale takings derived from all bettings on the races, 3-D and 4-D operations and other bettings undertaken by the Company or its authorized agents, on the races. [Emphasis added]

In my view when the parties were negotiating the agreement they intended to give the joint venture agreement business efficacy for a period of twenty years.

The second element is the officious bystander test. When the agreement was being negotiated, the officious bystander would ask the following question,

> Betting and lotteries are Federal matters under item 4 of the Ninth Schedule of the Federal Constitution. What will happen if the Sabah Gaming Ordinance is repealed by a Federal Order and the Pool Betting Act extended to Sabah?

The parties who had the benefit of the advice of their lawyers would have answered, "Of course we know that. We have made some provisions in cl. 11 with regard to the cancellation of the licence in different situations. We anticipate the changes in the law and there is no need to make any express provision in the agreement."

In my opinion, both elements have been satisfied. The Court of Appeal has erred on the issue of implied terms. I agree with my learned brother Peh Swee Chin FCJ that the decision of the High Court in implying a term in the agreement should be upheld.

With regard to the issue of illegality, I agree with the learned President of the Court of Appeal and my learned brother Peh Swee Chin FCJ that the agreement violates condition 23 of the licence issued by the Ministry of Finance in January 1995. Condition 23 prohibits the assignment or the transfer of rights. Under the agreement the Club had assigned to Sababumi all rights to manage all bettings on the races on the race course and to operate all 3-D and 4-D lotteries. A breach of condition 23 is an offence punishable under s. 21 of the Pool Betting Act. This is contrary to s. 24(a) of the Contracts Act and the agreement is therefore illegal and void.

For the reasons stated above I dismiss the appeal with costs here and in the Court of Appeal. Each party shall bear its own costs in the High Court.

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